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Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights

Note by the Secretariat

The Secretariat has the honour to transmit the report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights, prepared pursuant to Council resolution 27/30.

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Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights

Contents

		Page
I.	Introduction	3
II.	What are vulture funds?	3
III.	Case studies	6
	A. *Donegal International v. Zambia*	6
	B. *FG Hemisphere v. Democratic Republic of the Congo*	7
	C. *NML Capital Limited v. Argentina*	8
IV.	Disruptive litigation: a growing trend	9
V.	National legislation	11
VI.	Forging international consensus	13
VII.	Towards a multilateral framework on debt restructuring	14
VIII.	Impact of the activities of vulture funds on human rights	15
IX.	Strengthening a human rights-based approach	19
X.	Conclusions and recommendations	21

I. Introduction

1. The present report is submitted in accordance with Human Rights Council resolution 27/30, by which the Council requested the Human Rights Council Advisory Committee to prepare a research-based report on the activities of vulture funds and their impact on human rights.

2. In the resolution, the Council reaffirmed that the activities of vulture funds highlighted some of the problems in the global financial system and were indicative of the unjust nature of the current system, which directly affected the enjoyment of human rights in debtor States. The Council called upon States to consider implementing legal frameworks to curtail predatory funds activities within their jurisdictions.

3. In preparing the report, the Advisory Committee sought the views and inputs of Member States, United Nations agencies, relevant international and regional organizations, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and relevant special procedures mandate holders, including the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, as well as national human rights institutions, non-governmental organizations and eminent academics. The report was prepared by the Rapporteur of the drafting group on the activities of vulture funds and the impact on human rights, Jean Ziegler.

4. The Advisory Committee would like to thank in particular the Governments of Argentina, Cuba, El Salvador, Kuwait, Mauritius, the Philippines and the Bolivarian Republic of Venezuela, the Ombudsman of Portugal, the National Commission for Human Rights of Greece, the Centre for Legal and Social Studies (CELS), Centre Europe–tiers monde (CETIM) and the Asamblea Permanente por los Derechos Humanos (APDH) for the information provided in response to the questionnaire sent in March 2015.

5. In the report the Rapporteur highlights the growing concerns raised by the strategies employed by vulture funds. He analyses some of the most striking examples and considers national and international initiatives undertaken to mitigate the negative impact of these activities on the enjoyment of economic, social and cultural rights and the right to development.

II. What are vulture funds?

6. There is no international legal regime governing cases of State "insolvency" or "bankruptcy". When a State defaults on its sovereign debt, a process for restructuring the debt must be initiated at its own initiative in order to get a reduction of the debt or an extension of the repayment terms. This implies undertaking complex and protracted negotiations with a very diverse range of creditors.[1] Participation in restructuring processes is voluntary and, therefore, even a small percentage of creditors may well decide to hold out with a view to obtaining a higher level of repayment in the future. It is at this point that vulture funds come into play.

[1] These might be international financial institutions, bilateral or multilateral lenders, private financial institutions or bondholders.

7. According to Cephas Lumina, the former Independent Expert on the effects of foreign debt on human rights, vulture funds are:

> private commercial entities that acquire, either by purchase, assignment or some other form of transaction, defaulted or distressed debts, and sometimes actual court judgments, with the aim of achieving a high return. In the sovereign debt context, vulture funds (or "distressed debt funds", as they often describe themselves) usually acquire the defaulted sovereign debt of poor countries (many of which are heavily indebted poor countries (HIPCs)), on the secondary market at a price far less than its face value and then attempt, through litigation, seizure of assets or political pressure, to seek repayment of the full face value of the debt together with interest, penalties and legal fees (see A/HRC/14/21, para. 8).

8. These commercial entities are not lenders, but private hedge funds that purchase on the secondary market (or collect from other bondholders) distressed debt at discounted prices and then sue the debtor for a much higher amount. They are popularly called "vultures" because of their modus operandi, whereby they:

(a) *Target sovereign States with distressed economies and frequently with weak capacity for legal defence*. According to the African Development Bank, 20 of the 36 poorest developing countries have been threatened or targeted by aggressive litigation by vulture funds since 1999.[2] The World Bank estimates that more than one third of the countries that qualified for its debt relief initiative have been targeted by lawsuits by at least 38 litigating creditors, with judgments totalling $1 billion in 26 of the cases;[3]

(b) *Operate and take advantage of the lack of regulation of the secondary market*. To obtain significant discounts, vulture funds acquire sovereign bonds when the indebted country is either close to default or has already defaulted on its debt. In the secondary market, investors can operate with great secrecy in terms of both ownership and operations. Sovereign bonds are thus traded between investors without the concerned debtor State necessarily being aware or informed of such operations;[4]

(c) *Refuse systematically to participate in orderly and voluntary debt restructuring processes*. Once a State starts negotiations with private bondholders aimed at restructuring the sovereign debt, vulture funds exercise their "right" to hold out or collect and purchase sovereign distressed bonds, then wait until the country's financial situation has improved to start negotiations for a better deal. Their position is strengthened by difficulties that the debtor State may encounter in reaccessing the international capital markets.[5] Under such circumstances, the threat of being subjected to a long and costly process with a particularly "aggressive" litigator imposes additional pressure on the State that may prompt it to accept a less favourable settlement;

(d) *Sue the country for reimbursement of the full value of the bond, plus interest and delay penalties*. In cases where an agreement with the State is not reached, vulture funds can file a legal claim to seek reimbursement. To ensure that they get a favourable

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[2] African Development Bank Group, "Vulture funds in the sovereign debt context".

[3] Ibid.

[4] As has been pointed out, big institutional investors do not like to sue sovereign States and therefore can obtain some return by selling their defaulted debt to vulture funds on the secondary market. D. Sookun, *Stop Vulture Fund Lawsuit: A Handbook* (Commonwealth Secretariat, 2010), p. 11.

[5] Vulture funds may resort not only to court proceedings but also to lobbying and other pressure tactics, which can range from attempting to attach the debtor State's assets to organizing discrediting press campaigns with a view to forcing the Government to pay. R. Kupelian and M.S. Rivas, "Vulture funds: the lawsuit against Argentina and the challenge they pose to the world economy", Centro de Economía y Finanzas para el Desarrollo de la Argentina, Working Paper No. 49, February 2014, p. 7.

court decision, they make sure that "creditor-friendly" jurisdictions are involved in the resolution of the dispute.[6] The courts of debtor countries are increasingly becoming an available option as weaker legal systems are easily overwhelmed by the level of technical detail involved in this kind of litigation.[7] Cases brought by vulture funds are particularly protracted: the average estimated time for recovery is six years, which would suggest annualized returns averaging from 50 to 333 per cent.[8] Such long judicial proceedings are always burdensome and can complicate debtor States' financial and reserve management;

(e) *"Chase" the country to enforce the judgment*. Once vulture funds have obtained a favourable judgment, they seek its enforcement before different courts (i.e., through "forum shopping" practices) until they secure the enforcement action they desire. Figures show that attachment of the country's assets abroad has become a particularly common enforcement strategy in past years.[9] Despite many unsuccessful attempts, such actions have often helped vulture funds to achieve a favourable out-of-court settlement. However, vulture funds continue to deploy a legal strategy before courts that seek to enforce favourable rulings by challenging the doctrine of sovereign immunity, which has traditionally protected certain State properties and assets from seizure;[10]

(f) *Obtain exorbitant profits*. Vulture funds have achieved, on average, recovery rates of some 3 to 20 times their investment, equivalent to returns of 300 to 2,000 per cent. The International Monetary Fund (IMF) estimates that in some cases the claims by vulture funds constitute as much as 12 to 13 per cent of a country's gross domestic product (GDP);[11]

(g) *Operate in jurisdictions where bank secrecy rules apply*.[12] Most vulture funds are incorporated in tax havens, where there is no obligation to disclose information on benefits or ownership and it is feasible to hide gains to avoid or evade taxation.[13] Such jurisdictions facilitate the secretive manner in which vulture funds operate as well as the flight of much-needed capital, particularly from developing countries (see A/HRC/14/21, paras. 13-14).

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[6] London and New York are the primary locations for external sovereign borrowing and related legal disputes. Studies provide evidence that over 70 per cent of international bonds were issued under New York State law, while most of the reminder were issued under English law. J. Schumacher, C. Trebesch and H. Enderlein, "Sovereign defaults in court: the rise of creditor litigation", 6 May 2014, p. 1.

[7] "Vulture funds and poor country debt: recent developments and policy responses", Jubilee USA Network Briefing Note No. 4, April 2008, p. 3.

[8] African Development Bank Group, "Vulture funds in the sovereign debt context".

[9] Li Yuefen, Special Adviser, South Centre, presentation to the Advisory Committee on 25 February 2015. A ruling of the High Court of the United Kingdom of Great Britain and Northern Ireland in 2005, for example, allowed the firm Kensington International Ltd. to intercept the proceeds of oil sales of the Congo to recoup a $39 million debt. The profits realized by the Congo from the sale of oil can be seized until a claim of $90 million is repaid.

[10] Schumacher, "Sovereign defaults in court", pp. 7-8 and 12.

[11] African Development Bank Group, "Vulture funds in the sovereign debt context".

[12] For example, Donegal International Ltd. is based in the British Virgin Islands, Kensington International Ltd. in the Cayman Islands and FG Hemisphere in Delaware, United States of America.

[13] Some of the features of these jurisdictions are: opacity (bank secrecy or other mechanism such as trusts); low taxation or exemption from taxation for non-residents; regulations favourable to the establishment of front companies without real activity on the territory; lack of cooperation with other countries' inland revenue, customs and/or judicial authorities; and weak or non-existent financial regulation. See R. Vivien, "FG Hemisphere vulture fund's latest victory against the Democratic Republic of Congo: What is Belgium doing?", Committee for the Abolition of Illegitimate Debt, 2 January 2011. Available from www.cadtm.org.

III. Case studies

9. Vulture funds have a long history of predatory practices against developing countries, particularly heavily indebted poor countries (HIPCs). The most commonly targeted are countries, most of them in Africa and Latin America, with already unsustainable debt burdens and lacking the capacity and resources needed to face complex and protracted judicial processes. In recent years, vulture funds have aimed their profit expectations at middle-income countries, particularly Argentina. With more than 40 lawsuits filed by commercial investors after the default of 2001, the country accounts for a third of the total number of lawsuits brought by vulture funds.[14] The Rapporteur examines in detail in this section some examples of the impact of vulture fund strategies and activities on human rights.

A. *Donegal International v. Zambia*

10. By 1984, the Government of Zambia was unable to service a $30 million debt owed to Romania for the acquisition of agricultural equipment. In early 1997, the firm Debt Advisory International (which later incorporated Donegal International) began to put forward proposals for acquiring the debt. In 1999, just as Zambia was about to reach the decision point for comprehensive debt relief under the HIPC Initiative, Romania sold the debt to Donegal International for about $3 million, 11 per cent of the face value.

11. In 2003, in controversial circumstances involving allegations of corruption and bribing of public officials, Zambia signed a settlement agreement with Donegal International to waive sovereign immunity from litigation and paid approximately $15 million of the then $44 million face value of the debt. The agreement also included penal rates of interest in the event of default and the application of United Kingdom law to any future dispute arising from it. After paying off a total of $3.4 million, the Government of Zambia stopped fulfilling the terms of the agreement, arguing that it was tainted with corruption (see A/HRC/14/21, para. 24).

12. In 2006, only months before Zambia was due to receive debt cancellation under the HIPC Initiative, the company sued the country in the United Kingdom courts for a total amount of $55 million. Donegal obtained a favourable ruling, obtaining a 370 per cent return, nearly 17 times the value of the original debt.

13. The Government of Zambia reportedly recognized the judgment and allocated about 65 per cent of the amount received, already earmarked for health programmes, to service the debt (ibid., para. 25).[15] As a result of this litigation, vulture funds took away from the country almost 15 per cent of its total social welfare expenditure, funds that could have been channelled instead towards education, health care and poverty alleviation.[16]

[14] Schumacher, "Sovereign defaults in court", p. 36.

[15] See also Kupelian, "Vulture funds", p. 9 and T. Laryea, "Donegal v. Zambia and the persistent debt problems of low-income countries", *Law and Contemporary Problems*, vol. 73, No. 4 (Fall 2010).

[16] Li Yuefen, presentation to the Advisory Committee; L. Polgreen, "Unlikely ally against Congo Republic graft", *New York Times*, 10 December 2007.

B. *FG Hemisphere v. Democratic Republic of the Congo*

14. In 1980, the Democratic Republic of the Congo entered into a credit agreement with Energoinvest, a company based in Sarajevo, for the construction of a high-voltage electric power transmission facility. The country soon defaulted on its repayment obligations.

15. In 2003, the International Chamber of Commerce made two arbitral awards in favour of the company and in 2004 a District Court in the United States of America confirmed the amounts to be paid: $18,430,000 and $11,725,000, plus 9 per cent interest and the costs of arbitration. At that point, the company decided to transfer the right to recover the claim to FG Hemisphere, a company based in the State of Delaware, a tax haven in the United States.[17] The debt was reportedly purchased for $37 million.[18]

16. FG Hemisphere then pursued its claim on the debt by attempting to seize the country's assets in different parts of the world. In 2005, a court ordered the Government to provide detailed information about the location of those assets worth more than $10,000.[19] Following the failure to provide that information, a District Court in the United States imposed a fine of $5,000 per week, to increase periodically to a maximum of $80,000 per week, for failing to comply with the order (ibid., para. 19).

17. To enforce the 2003 rulings, FG Capital Management has managed to freeze hundreds of millions of dollars owed to the Democratic Republic of the Congo and obtained enforcement judgments from several courts all around the world. In November 2008, a South African court effectively halted sales of electricity from the country by ruling that FG Hemisphere could seize any payments for services sold by the Democratic Republic to South Africa. In February 2010, the Court of Appeal in Hong Kong froze about $100 million of a signing bonus for a $6 billion minerals-for-infrastructure agreement between the Democratic Republic and China until the International Chamber of Commerce awards were resolved.[20] The agreement included the payment of $221 million in mining entry fees to the Government, which FG Hemisphere sought to receive towards payment of the arbitral award. The Government of the Democratic Republic claimed State immunity, but the Court of Appeal ruled that the Democratic Republic had no immunity in commercial proceedings.[21]

18. This is an unfortunate event for a country that needs money for development. The Democratic Republic of the Congo is rich in natural resources, but is recovering from more than four decades of dictatorship and war that have destroyed its infrastructure. In fact, it is difficult to see how a country with one of the lowest Human Development Index rankings (176) can service its external debt obligations without at the same time harming its poverty reduction and economic development prospects (ibid., para. 20). The negative impact of vulture funds on the State's capacity to create the conditions necessary to fulfil its human rights obligations is therefore evident.

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[17] The sale was approved by the former Prime Minister of Bosnia and Herzegovina, who was investigated on corruption charges relating to his tenure at Energoinvest. "Vulture funds–the key players", *Guardian*, 15 March 2011.

[18] M. Kavanagh, "Congo, U.S.-controlled venture lose $100 million vulture claim", 3 November 2010. Available from Bloomberg.com.

[19] Sookum, *Stop Vulture Fund Lawsuit*, p. 45.

[20] Kavanagh, "Congo, U.S.-controlled venture lose $100 million vulture claim".

[21] K. Crossley, "Case analysis: *Democratic Republic of the Congo and Ors v. Hemisphere Associates LLC*", *Asian Legal Business*, 17 June 2011.

C. *NML Capital Limited v. Argentina*

19. It has been well documented how the deteriorating economic, financial and social situation led Argentina to a catastrophic collapse in 2001 (A/HRC/25/50/Add.3). Soon after defaulting, the Government recognized the need to restructure roughly $81 billion of debt. In two successive exchanges of offers, in 2005 and 2010, Argentina succeeded in reaching an agreement with more than 92 per cent of its creditors, which agreed to take an approximately 70 per cent "haircut" on their bond holdings.

20. A group representing 1.6 per cent of bondholders, led by NML Capital Ltd. (a hedge fund based in the Cayman Islands),[22] refused to restructure and decided to sue the country in the New York State courts for the full amount. Some of the defaulted bonds had been bought on the secondary market just before the country's default in 2001, but most were purchased after, at bargain prices. The vulture funds allegedly paid about $48.7 million for more than $220 million in defaulted bonds soon after the default; others were purchased even after the bond exchanges of 2005 and 2010 (ibid., para. 32).

21. In November 2012, a New York District Court judge ordered Argentina to pay NML Capital and other "holdouts" in full (about $1.3 billion), an amount that may represent a profit of about 1,600 per cent.[23] The court ruling was first confirmed by a decision of the United States Court of Appeals for the Second Circuit and subsequently endorsed by the Supreme Court, which stated that the country could not pay the creditors that had accepted the exchange offers until the "holdout" creditors had been paid in full.

22. These rulings represent a major departure from the traditional market/legal understanding of the pari passu clause, a common component of bond contracts.[24] NML contended that the country was not granting the same treatment to the creditors that did not participate in the exchange because it had agreed only to pay its debt to the exchange bondholders.[25]

23. In February 2016, with a newly elected Government in office in Argentina, the United States court set a number of conditions to effectively lift the injunction and allow Argentina to service the restructured debts.[26] Events accelerated from then on and in April, ceding to massive financial pressure, Argentina abruptly reversed its previous policy

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[22] Elliott Management investment fund controls NML Capital and has brought actions against Argentina and many other countries. The chief executive officer, Paul Singer, is one of the main financial backers of the Republican Party in the United States, which gives him enormous lobbying power as well as substantial political and legal support for carrying out these operations. See Kupelian, "Vulture funds", p. 10.

[23] Letter dated 9 July from Axel Kicillof, Minister of Economy and Public Finance of Argentina, to the *Financial Times*.

[24] By equal step or without preference. The international financial markets have long understood that this clause protects a lender against the risk of legal subordination in favour of another creditor. See L.C. Buchheit and J.S. Pam, "The pari passu clause in sovereign debt instruments", *Emory Law Journal*, vol. 53 (Special Edition, 2004), pp. 869-870.

[25] See J. Muse-Fisher, "Starving the vultures: *NML Capital v. Republic of Argentina* and solutions to the problem of distressed-debt funds", *California Law Review*, vol. 102, No. 6 (2014), p. 1689. Instead of providing for contractual protection against the risk of legal subordination in favour of another creditor holder of unsubordinated and unprotected debt, the pari passu clause is interpreted more broadly as providing factual preference to "holdout" creditors over the rest of creditors.

[26] "Argentina wins a victory against its hedge-fund creditors", *Economist*, 21 February 2016.

regarding these claims and agreed in an out-of-court settlement to pay $6.5 billion dollars to the "holdouts".[27]

24. The settlement represents a further setback in the process aimed at setting up an international sovereign debt restructuring mechanism based on the equal treatment of creditors, and human rights experts have expressed profound regret. Paying vulture funds much more than what was paid to cooperative creditors in previous debt restructuring is a disturbing outcome. Rewarding those who refuse to participate in debt restructuring efforts sends the wrong message.[28]

25. Doubts arise as to whether this settlement will be advantageous from a human rights perspective. Indeed, putting an end to more than a decade of judicial disputes may, in the short term, reinforce the country's credibility and allow it to borrow on the international financial markets. But in order to pay the "holdouts", the Government has been forced to increase its debt burden, a fact that, in the long run, may hinder the State in complying with its obligations in the area of economic and social rights, thereby also exacerbating inequality and financial instability.

26. In any event, this long judicial dispute highlights the pressing need to regulate speculative investment practices in order to bring them into line with human rights approaches and requirements. Furthermore, it has prompted a process aimed at establishing a multilateral mechanism with a mandate to resolve sovereign debt litigation in an independent and impartial manner.

27. Although the legal consequences of this case should not be underestimated, its final outcome must be read in the light of the particular circumstances that surrounded the dispute and the evident political implications involved therein. There is no doubt, however, that the doctrine endorsed by the United States courts provides vulture funds with increased credibility that will certainly incentivize them to pursue these strategies further in the future.[29]

IV. Disruptive litigation: a growing trend

28. The case of Argentina is not an exception, but forms part of a more general trend. Increasingly, non-cooperative creditors are reaping extraordinary profits owing to settlements reached or judgments obtained after disruptive litigation. Not only do investors' expectations of obtaining high returns by suing countries asphyxiated by onerous financial terms benefit from the lack of a global mechanism on debt restructuring, but they may also be at the origin of this state of affairs.

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[27] Raising the funds required the biggest bond sale by a developing country, worth $16.5 billion dollars with an interest rate between 6.5 and 8 per cent. "Sovereign debt: curing defaults", *Financial Times*, 7 June 2016. See also *Official Records of the General Assembly*, 107th plenary meeting, 9 September 2014 (A/68/PV.107), p. 6.

[28] OHCHR, information note, "Hold-out deal in Argentina makes solving debt crises more difficult, United Nations rights experts say", 8 March 2016.

[29] Debt and Development Coalition Ireland, "Stop debt vultures: implications of the vulture attack on Argentina", 1 September 2014.

29. In fact, statistics show that lawsuits and attempted attachments are increasingly becoming a common way of solving sovereign debt disputes, entailing costly and protracted judicial processes for the State that has defaulted.[30] The trend has grown since the 1990s, from 10 to almost 50 per cent of such disputes. In the period 1976-2010 there were about 120 lawsuits against 26 defaulting countries in the United States and the United Kingdom alone.[31] The high rate of success (72 per cent) certainly encourages this worrying tendency.[32]

30. Accounting for 79 and 27 creditor lawsuits respectively, Latin American and African countries are among the most affected. Over the past few years, litigation against HIPCs has reached a plateau. Although most lawsuits are now filed against middle-income countries, nearly 30 per cent of all lawsuits have been launched against HIPCs.[33] In March 2016, at least 13 cases were still outstanding against eight such countries.[34]

31. With an average of eight cases being filed per year, Africa has been by far the most harassed region. According to IMF reports, claims by vulture funds constitute between 12 and 13 per cent of African countries' GDP. African countries have the lowest rate of winning cases and have disbursed more than 70 per cent of the nearly $1 billion dollars awarded to vulture funds as a result of lawsuits.[35]

32. In 2008 the African Development Bank established the African Legal Support Facility with the aim of providing legal assistance and advice on how to tackle the activities of vulture funds and disincentivize creditors from pursuing debt litigation against African countries.[36] As of January 2016, the agreement establishing this international organization had been signed by a total of 52 African and other States, including Belgium, Brazil, France, the Netherlands and the United Kingdom, and 7 international organizations.[37]

33. Also with a view to minimizing future creditor lawsuits, a "HIPC Legal Clinic" was established in 2006 by the Commonwealth Secretariat to assist sovereign debtor States to face creditor litigation and in the negotiation and renegotiation of foreign debt.[38]

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[30] Schumacher, "Sovereign defaults in court", p. 2. The study concludes that "creditors can retaliate against defaults via legal means" and by "throwing sand in the wheels" of the economy of defaulting countries.

[31] Ibid., pp. 1 and 4. This number does not include litigation resulting from bilateral investment treaties or before international arbitration bodies, which are increasingly being used by vulture funds to deploy their strategies.

[32] IMF, Factsheet: Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative, 8 April 2016.

[33] Currently, 39 States are classified as HIPCs, i.e., countries with high poverty levels that are eligible for financial assistance from IMF and the World Bank.

[34] IMF, *"Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI) – Statistical Update"*, March 2016, p. 46.

[35] Ibid.; see also African Legal Support Facility, Medium Term Strategy 2013-2017, adopted on 29 May 2012, p. 10. Available from alsf.afdb.org/sites/default/files/resources/ALSF_MTS%20%281%29%20copy.pdf.

[36] The Management Board approved supporting the first case involving vulture fund litigation against the Democratic Republic of the Congo in 2010. African Legal Support Facility, Medium Term Strategy 2013-2017, p. 10.

[37] See alsf.afdb.org/basic/members.

[38] Ministerial statement adopted at the Commonwealth HIPC Ministerial Forum of the Commonwealth Secretariat, held in Washington, D.C., on 12 April 2007.

V. National legislation

34. At present, only two countries, Belgium and the United Kingdom, have enacted some sort of legal framework to discourage disruptive litigation initiated by vulture funds. In 2013, United Kingdom legislation was replicated in the Overseas Territories and the dependencies of Jersey, Guernsey and the Isle of Man.[39] Attempts to enact similar initiatives in France and the United States have so far failed.[40]

35. While these national laws have played an important deterrent role, it is evident that more national laws are needed to tackle this problem effectively. The enactment of national legislation is particularly needed in those jurisdictions preferred by vulture funds for starting litigation or enforcing attachments. In that regard, useful guidelines for States can be derived from existing domestic laws and experience on their implementation, including the following: (a) protection should be extended to any debt-distressed country and not only to HIPCs; (b) where possible, procedures should allow for the identification of debts that are protected from the claims of vulture funds, on the basis of objective criteria; (c) concerns about the socioeconomic situation of the debtor State and the well-being of its population should be adequately incorporated and addressed by the legislator; and (d) issues regarding the lack of transparency in the secondary debt market and the operation of vulture funds in tax havens should be also tackled.

Belgium

36. Belgium was the first country to pass a law in 2008, to safeguard "funds disbursed towards development cooperation and debt relief" from vulture funds' actions.[41] The legislation was adopted in reaction to the numerous lawsuits lodged before national courts by vulture funds seeking to seize the funds allocated to developing poor countries under official development assistance programmes.[42] The law automatically bars such attempts.

37. A law passed in 2015 set out a more detailed framework by fixing limits to the amount that legitimately can be claimed by the vulture funds.[43] In cases where it is demonstrated that the creditor pursues an "illegitimate advantage" through the repurchase of a loan or a claim owed by a State, the law provides that "its rights with respect to the debtor State will be limited to the price it paid to repurchase such a loan or debt".

38. Further, the law sets two cumulative conditions that must be fulfilled in order to conclude that an "illegitimate advantage" is being pursued. First, there must be a "manifest disproportion" between the repurchase price of the loan or debt and the face value or the amounts that the creditor seeks to recover from the State; second, at least one of the following criteria must be met:

(a) The debtor State was insolvent (or a default was imminent) at the time of the debt buy-back;

(b) The creditor is based in a tax haven or similar jurisdiction;

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[39] See, for example, Debt Relief (Developing Countries) (Jersey) Law 2013.

[40] See *Proposition de loi n° 3214, visant à lutter contre l'action des fonds financiers dits « fonds vautours »*, 28 June 2006; and H.R.2932, Stop Very Unscrupulous Loan Transfers from Underprivileged Countries to Rich, Exploitive Funds Act, 1 August 2008.

[41] *Loi visant à empêcher la saisie ou la cession des fonds publics destinés à la coopération internationale, notamment par la technique des fonds vautours*, 6 April 2008.

[42] Ten lawsuits were lodged against the Democratic Republic of the Congo in 2007 alone. Sookum, *Stop Vulture Funds Lawsuits*, pp. 90-91.

[43] *Loi relative à la lutte contre les activités des fonds vautours*, 12 July 2015.

(c) The creditor systematically uses legal proceedings to obtain repayment;

(d) The creditor refused to take part in debt restructuring efforts;

(e) The creditor abused the weakness of the State to negotiate a repayment which is manifestly unbalanced;

(f) The total reimbursement of the amounts demanded by the creditor would have a measurably adverse impact on the public finances of the State and would likely compromise the socioeconomic development of its population.

39. The law is not limited to HIPCs and provides comprehensive protection against litigation by vulture funds. It integrates human rights concerns while taking due account of the important public interests at stake when dealing with sovereign debt.[44] Requiring the judges to make an assessment of the impact that the repayment of the debt might have on the socioeconomic situation of the debtor State and on the well-being of its population is certainly an innovative element and one of the most prominent aspects of this legislation.

40. NML Capital is now seeking the annulment of this legislation through a recourse recently filed before the Constitutional Court of Belgium.[45] Three Belgian civil society organizations have intervened in the process to support this legislation in defence of the public interest.[46] It is contended that the several legal arguments put forward by the vulture funds seek an endorsement of the pre-eminence of the right to property of the bondholders, ignoring the broader human rights implications of the Belgian law.[47]

United Kingdom of Great Britain and Northern Ireland

41. In the United Kingdom, Parliament first discussed a draft bill aimed at limiting the "maximum recoverable amount" of the defaulted sovereign debt of developing countries in 2009.[48] The proposal established a threshold for the maximum recoverable amount ("equal to any amounts recovered from other actions related to the same defaulted sovereign debt"), the interest rate and the manner in which it is calculated.[49] It further required that, before seeking a judgment or the enforcement of a judgment, vulture funds must file a "consent application" to provide national authorities with all the relevant information related to the acquisition or collection of the defaulted sovereign debt.[50]

42. The initial draft did not pass, but in September 2010, another bill pursuing similar aims was adopted. The Debt Relief (Developing Countries) Act 2010 specifically limits the amount recoverable of claims related to "qualifying debts". The legislation applies to any

[44] Chambre des Représentants de Belgique, *Proposition de loi concernant la lutte contre les activités des fonds vautours*, Doc 54 0394/001, 7 October 2014.

[45] R. Vivien, « Après l'Argentine, les fonds vautours s'en prennent à la Belgique », *Le Soir*, 12 April 2016.

[46] "Three NGOs in court against a vulture fund", press conference, Press Club Brussels, 15 June 2016; see also OHCHR, "Belgian legislation against vulture funds should be preserved – United Nations rights expert urges", 15 June 2016.

[47] See *Requête en intervention du Comité pour l'abolition de la dette du Tiers Monde (CADTM), le Centre national de coopération au développement (CNCD-11.11.11), et Koepel van de Vlaams Noord Zuidbeweging 11.11.11, concernant la requête en annulation déposée par NML Capital Ltd contre la loi du 12 juillet 2015 relative à la lutte contre les activités des fonds vautours*.

[48] Developing Country Debt (Restriction of Recovery) Bill 2008-2009.

[49] Ibid., section 3.

[50] Ibid., section 6.

judgment by a court in the United Kingdom and foreign judgments enforceable in the United Kingdom, as well as to arbitral awards.[51] However, its scope is limited to HIPCs.

43. The aim of the law is to ensure that courts in the United Kingdom neither render nor enforce a judgment that allows recovery of covered debts of those countries in excess of the amount calculated as sustainable debt under the HIPC Initiative. The creditor may not recover more than the existing debt, even if the debt is renegotiated or the subject of a new agreement. While there is no provision for cancellation of debt, enforcement is limited to the recoverable amount under the existing debt, irrespective of the law applicable to the debt or claim.[52]

Other draft legislation

44. An amendment introduced to a draft bill related to transparency, corruption and the modernization of the economic sphere was recently discussed in France. The proposed new amendment aims at protecting States facing a sovereign default and that are beneficiaries of official development assistance. Of note is that vulture funds are required to obtain an authorization from the court before proceeding to seizure for debt recovery.[53] The draft supplements another proposal aimed at guaranteeing immunity from seizure to certain State properties.[54]

VI. Forging international consensus

45. A growing consensus has emerged in recent years on the need to curb the activities of vulture funds. A number of States have expressed support for international action to protect HIPCs in particular from the activities of vulture funds as well as broad support for the establishment of an international mechanism for orderly debt restructuring.

46. In a meeting of the Group of Eight held in May 2007, finance ministers and governors of central banks expressed their concern about the problem of aggressive litigation against HIPCs. While welcoming the steps already taken by the Paris Club to address this problem, they urged all sovereign creditors not to sell claims on those countries.[55]

47. The same year, Commonwealth finance ministers affirmed that they were particularly alarmed at the lawsuits filed against HIPCs by some commercial creditors, especially vulture funds, and emphasized the need for concerted international action to address this problem. They urged Governments to introduce legal protection to ensure that, as a minimum, debt relief was provided on terms equivalent to the HIPC framework.[56]

[51] Ibid., section 5.

[52] M. Waibel, "Debt relief to poor countries: rules v. discretion", *Butterworths Journal of International Banking and Financial Law* (June 2010), available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612242.

[53] At the time of writing, the law was being discussed by the Senate. See A. Paredes-Vanheule, "France to restrict 'vulture funds' claims", Investment Europe, 3 June 2016.

[54] *Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*, arts. 24 and 24 bis.

[55] "Statement of G7 Finance Ministers and Central Bank Governors", Washington, D.C., 19 October 2007.

[56] Ministerial statement adopted at the Commonwealth HIPC Ministerial Forum.

48. In 2008, the European Union member States committed themselves not to sell claims on HIPCs to creditors unwilling to provide debt relief.[57] A year earlier, members of the Paris Club endorsed the same position.[58]

49. Similar concerns were also expressed by the States signatories to the Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, adopted in 2008, in which they welcomed steps taken to prevent aggressive litigation against HIPC- eligible countries, including through the enhancement of debt buy-back mechanisms and the provision of technical assistance and legal support, and called on creditors not to sell claims on HIPCs to those that refuse to participate adequately in debt relief efforts.[59]

50. In 2009, the Parliamentary Assembly of the Council of Europe adopted a recommendation in which it strongly condemned the activities of vulture funds, which "have no compunction in taking advantage of opportunities arising from debt waivers granted by creditor countries, particularly European, or blocking worldwide the assets of the countries concerned and threatening them with bankruptcy".[60]

51. In 2014 and 2015, the Ministers for Foreign Affairs of the member States of the Group of 77 (G-77) and China recognized that the activities of vulture funds and their actions of a highly speculative nature posed a risk to all future debt restructuring processes, for both developing and developed countries. They further stressed the importance of not allowing vulture funds to paralyse the debt restructuring efforts of developing countries, and affirmed that those funds should not supersede a State's right to protect its people under international law (see A/69/423, annex, para. 29 and A/70/410, annex, para. 33).

52. In July 2014, some one hundred civil society organizations worldwide supported the establishment of an international mechanism for the restructuring of sovereign debt "based on the obligation of States to respect, protect and enforce human rights, both in their territory and extraterritorially".[61]

VII. Towards a multilateral framework on debt restructuring

53. In response to the increasing demand for international action, the General Assembly adopted on 9 September 2014 a landmark resolution entitled "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes". Tabled at the initiative of the G-77 and China, a large majority of Member States voted in favour of the resolution.[62] In the resolution, the Assembly recognized the need for a legal framework that would facilitate the orderly restructuring of sovereign debts while allowing the re-

[57] Council of the European Union, "Council conclusions: speeding up progress towards the Millennium Development Goals", para. 41.

[58] Press release of the Paris Club on the threats posed by some litigating creditors to heavily indebted poor countries, 22 May 2007.

[59] See General Assembly resolution 63/239, annex, para. 60. In the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, annexed to General Assembly resolution 69/313, signatories reiterated their concern with non-cooperative creditors who have demonstrated their ability to disrupt timely completion of the debt restructurings (para. 98).

[60] "Protecting financial aid against 'vulture funds'", document CM/AS(2009)Rec1870 final, 12 June 2009, para. 3.

[61] See www.cels.org.ar/common/documentos/Deuda%20Externa%20y%20DDHH%20-%20CELS%20-ENG.pdf.

[62] Resolution 68/304, adopted by a vote of 124 in favour and 11 against, with 41 abstentions.

establishment of viability and growth without creating incentives that would inadvertently increase the risk of non-compliance. Such a framework should act as a deterrent to disruptive litigation that creditors could engage in during negotiations to restructure sovereign debts. In explicit reference to vulture funds, the Assembly highlighted that their activities forced indebted countries to divert many of their resources to handle such litigation, thereby undermining the purpose of the debt restructuring processes.

54. In September 2015, the General Assembly adopted resolution 69/319,[63] in which it declared that sovereign debt restructuring processes should be guided by the Basic Principles on Sovereign Debt Restructuring Processes, as included in the report of the Ad Hoc Committee (A/AC.284/2015/2).[64] According to the principle of sustainability, debt restructuring workouts should lead to stable debt situations while promoting sustained and inclusive economic growth and sustainable development. This relevant principle also requires minimizing economic and social costs, warranting the stability of the international financial system and respecting human rights.[65]

55. By its general character, sustainability has become a key principle in the promotion and protection of economic development, growth and human rights.[66] In times of debt crisis, different interests are at play and a balance must be struck between them. The private interest of the outset creditor's rights cannot be protected at the expense of the public interest of protecting and promoting the sustained and inclusive economic growth and sustainable development of a country.

56. Against this background, the Human Rights Council, on 26 September 2014, adopted, by a large majority, another landmark resolution, entitled the "Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: the activities of vulture funds", supported by a large majority. In resolution 27/30, the Council explicitly condemned the direct negative effect that the debt repayment to those funds, under predatory conditions, had on the capacity of Governments to fulfil their human rights obligations.[67] The Council called upon States to consider implementing legal frameworks to curtail predatory vulture fund activities within their jurisdictions.

VIII. Impact of the activities of vulture funds on human rights

57. Human rights monitoring bodies have contributed to articulating the linkage between the activities of vulture funds and human rights, in particular by focusing on the negative impact such activities have on the capacity of the State to fulfil its human rights obligations (see in particular A/HRC/14/21).[68] Empirical research has also analysed the negative economic and financial consequences derived from commercial litigation against

[63] Adopted by a vote of 136 in favour and 6 against, with 41 abstentions.

[64] The nine principles are sovereignty, good faith, transparency, impartiality, equitable treatment, sovereign immunity, legitimacy, sustainability and majority restructuring.

[65] For a comment, see J.P. Bohoslavsky and M. Goldmann, "An incremental approach to sovereign debt restructuring: sovereign debt sustainability as a principle of public international law", *Yale Journal of International Law*, 2016 (forthcoming).

[66] OHCHR, "Restructuring of sovereign debt: United Nations expert stresses General Assembly principles are binding", 10 September 2015.

[67] Adopted by a vote of 33 in favour and 5 against (Czech Republic, Germany, Japan, United Kingdom and United States), with 9 abstentions. It was co-sponsored by 79 additional States.

[68] The duty to fulfil imposes on the State an obligation to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of economic, social and cultural rights.

debt- distressed and poor States.[69] These studies show that such legal disputes are becoming increasingly common and costly for the States concerned.[70] Litigation and attachment attempts by vulture funds may pose difficulties for the State in accessing international capital markets and may also entail a significant decline in international trade for the debtor State.

58. In reality, the problem arises from the way in which vulture funds operate and the strategies they deploy to obtain disproportionate profits from speculating in sovereign debt and on how this affects the State's capacity to fulfil its human rights obligations.[71] According to the Independent Expert on the effects of foreign debt on human rights, the settlement of excessive claims by vulture funds against poor countries with unsustainable debt levels has a direct, negative effect on the capacity of the Governments of these countries to fulfil their human rights obligations, especially in terms of economic, social and cultural rights, particularly the rights to health, water and sanitation, food, housing and education.[72]

59. Through lengthy and costly litigation, vulture funds contribute to diverting States' resources from other, more pressing development, social and human rights issues (see A/HRC/14/21, para. 35). Protracted litigation may cause important delays in resolving the debt crisis and limit the State's capacity to commit resources and efforts necessary to bring the country out of the situation. It may worsen the already significant economic and financial consequences attached to the crisis and lead to policies that have a severe impact on the enjoyment of human rights.[73] Some of the most prominent negative impacts deriving from the activities of vulture funds are described in the following paragraphs.

Activities of vulture funds hinder the State's capacity to fulfil economic, social and cultural rights

60. Litigation by vulture funds represents a substantial burden on the budgets of already poor countries. Harmful conditions of loans or high and abusive interest rates may make repayment extremely difficult. The State having to repay far more than the amount originally borrowed may be obliged to redirect into debt service resources previously allocated for essential public services, also triggering cuts in public spending (ibid., para. 57). Such a course of action hinders the State's capacity to fulfil economic, social and cultural rights (i.e., to adopt appropriate measures towards their full realization) and, ultimately, has an impact on the economic growth and development of the country.[74]

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[69] The effects of disruptive litigation on the debt sustainability of HIPCs have been tracked on an annual basis by the Millennium Development Goals Task Force and the International Monetary Fund.

[70] Schumacher, "Sovereign defaults in court", p. 2.

[71] The assessment of how vulture funds hinder the capacity of recovery of States undergoing a debt crisis would imply systematically collecting and analysing data on the number of lawsuits filed, the debt service burden and budget allocations. It would also require a more detailed follow-up and analysis of relevant economic and social indicators.

[72] "'Vulture funds' – United Nations expert on foreign debt welcomes landmark law to address profiteering", press release, 20 April 2010.

[73] A debt crisis may entail a great deal of economic destruction and economic reversal along with sacrifice in human rights terms. A country can lose 5-15 per cent of its GDP. Li Yuefen, presentation to the Advisory Committee.

[74] The State's obligation to fulfil requires positive measures by the State when other measures have not succeeded in ensuring the full realization of these rights and can entail issues such as public expenditure, governmental regulation of the economy, the provision of basic public services and infrastructure, taxation and other redistributive economic measures. OHCHR, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (United Nations publication, Sales No. E.04.XIV.8), p. 18.

61. Human rights monitoring bodies have analysed how an excessive burden of high external debt repayments can significantly reduce the resources available for social investment. In fact, it has been demonstrated that in many countries debt repayment is often carried out at the expense of basic human rights, including the rights to food, health, education, adequate housing and work. In the case of Ecuador, for example, the Committee on Economic, Social and Cultural Rights noted that the high percentage of the annual national budget (around about 40 per cent) allocated for foreign debt servicing seriously limited the resources available for the achievement of effective enjoyment of economic, social and cultural rights (see E/C.12/1/Add.100, para. 9).

62. The case of Malawi may be extreme, but it shows how debt repayment affected the country's capacity to create the necessary conditions for the realization of economic and social rights. In 2002, the Government decided to sell the maize from its national food reserve agency with the aim of raising funds to repay loans. Following a poor harvest that year, 7 million people, of a population of 11 million, were left facing a serious food shortage (see A/HRC/11/10, para. 30).

Activities of vulture funds jeopardize international poverty reduction initiatives

63. The ability of vulture funds to jeopardize the objectives of the International Monetary Fund and the World Bank HIPC Initiative is striking, particularly bearing in mind that it aims at ensuring the debt sustainability of poor countries.[75] In a number of cases, it has been clearly demonstrated that resources freed up for development and poverty reduction programmes were used to service debt owed to vulture funds. This situation has led human rights monitoring bodies to urge the concerned State to reallocate international development aid and other resources to priority sectors and to ensure that international development aid is utilized for the progressive realization of the rights to an adequate standard of living see (see E/C.12/COD/CO/4, para. 29).

64. A good example is the case of the Democratic Republic of the Congo. A District Court in the United States ruled in 2014 that it had to pay nearly $70 million to a vulture fund for an $18 million debt acquired in 2008, dating back to the regime of former dictator Mobutu Sese Seko in the 1980s.[76] On the basis of the improved fiscal situation resulting from international debt reduction programmes, the country was ordered to pay the claims of the hedge funds. This example shows how domestic rulings can clearly undermine the intent of the HIPC Initiative, which is often not taken into account by national courts.[77]

65. This is not an isolated case, however. In 2013, the World Bank and IMF reported that commercial litigation was ongoing against eight HIPC countries. The report highlighted that such legal struggles not only had adverse financial consequences for the poorest countries, but also took up considerable time and resources of debtor government authorities.[78]

66. Thus, under present circumstances, funds obtained by the poorest countries from debt relief may easily be channelled to repay an outstanding loan pursuant to court rulings. As a result of aggressive, disruptive litigation, a debtor State may be forced to divert money

[75] The scheme was first launched in 1996 and was supplemented in 2005 by the Multilateral Debt Relief Initiative. More information is available from www.imf.org/external/np/exr/facts/hipc.htm.

[76] *Themis Capital, LLC and Des Moines Investments Ltd., Plaintiffs v. Democratic Republic of Congo and Central Bank of the Democratic Republic of the Congo, Defendants*, 14 July 2014.

[77] *Taking Stock of the Global Partnership for Development: Millennium Development Goals Gap Task Force Report 2015* (United Nations publication, Sales No. E.15.I.5), p. 46.

[78] *The State of the Global Partnership for Development: Millennium Development Goals Gap Task Force Report 2014* (United Nations publication, Sales No. E.14.I.7), p. 41.

earmarked for poverty reduction and basic social services, such as health and education, to settling the substantial claims of vulture funds.[79]

Activities of vulture funds contribute to increased debt service

67. Debt burden adversely affects the protection of economic and social rights not only because of the diversion of funds from social purposes to debt servicing,[80] but also because of the situation of dependency in which it puts the debtor States. It has been observed that such dependency "might result in a factual loss of sovereignty over their economic and social policies and in the imposition of policies with potentially negative consequences for the protection of social rights".[81]

68. Against this background, a reduction in debt service and debt cancellation can effectively create the conditions necessary for the realization of economic, social and cultural rights. Facts show that such measures have allowed many countries to invest more in public services such as health care, education, water and sanitation and to abolish user fees for some of these services that were previously introduced as part of austerity measures imposed by the international financial institutions.[82] However, it remains a controversial issue whether a State might be under an obligation not to repay its debt to vulture funds if it can do so only at the expense of neglecting the basic social needs of its people.

69. Under present circumstances, debtor States often have little choice but to prioritize their contractual debt obligations, contrary to what human rights law would require. This suggests that a more human rights-centred approach is needed. A State's obligation to ensure the enjoyment of at least the minimum core of economic and social rights should take priority over its debt service obligations, particularly when such payments further limit the country's ability to fulfil its human rights obligations (see E/C.12/GRC/CO/2, para.8). This is particularly the case when increased debt service is derived from harmful conditions linked to speculative claims that further limit the country's ability to fulfil its human rights obligations.

70. It is then a logical consequence of the evolution of human rights law that a State cannot decide to service debt at the expense of meeting its human rights obligations (see A/70/275). Sovereign debt workouts must not lead to violations of economic or social rights or prevent the attainment of internationally agreed development goals. The United Nation Conference on Trade and Development (UNCTAD) has observed in this regard that "full debt sustainability is only achieved when debt service does not entail intolerable sacrifices for the well-being of society".[83]

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[79] As has been observed, they "profiteer at the expense of both the citizens of HIPCs and the taxpayers of countries that have supported international debt relief efforts". See A/HRC/14/21, para. 69.

[80] In 2006, for example, 10 developing countries spent more on debt service than on public education, and in 52 countries debt servicing amounted to more than the public health budget. *Delivering on the Global Partnership for Achieving the Millennium Development Goals: Millennium Development Goals Gap Task Force Report 2008* (United Nations publication, Sales No. 08.I.17), executive summary, p. x.

[81] S. Michalowski, "Sovereign debt and social rights—legal reflections on a difficult relationship", *Human Rights Law Review*, vol. 8, No. 1 (January 2008), p. 39.

[82] C. Lumina, "Sovereign debt and human rights", in *Realizing the right to development: essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations publication, Sales No. E.12.XIV.1, pp. 289 and 294.

[83] UNCTAD, *Sovereign Debt Workouts: Going Forward. Roadmap and Guide*, April 2015, p. 24.

Activities of vulture funds undermine the realization of the Sustainable Development Goals

71. Lawsuits brought by vulture funds may slow down the progress made by both developed and developing countries in realizing the Sustainable Development Goals, in spite of strong support from the international financial institutions. Particularly relevant in this context is goal 17: "Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development". This goal targets assisting States in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and addressing the external debt of highly indebted poor countries to reduce debt distress.

IX. Strengthening a human rights-based approach

72. Vulture funds take advantage of the lack of adequate regulation of a financial system that has traditionally been based on purely commercial interests and foreign to human rights-based approaches and concerns. Though relevant actions have been undertaken in previous years, and though human rights monitoring bodies have provided some valuable guidance in striking a better balance between the different interests at stake, human rights should be further mainstreamed in this context.

73. The international community should work to provide the basis for shaping a more coherent framework where both commercial interests and human rights concerns are accommodated. In this context, the interlinkages between an enhanced capacity of States to fulfil economic, social and cultural rights and sustainable development should be strengthened.[84]

74. Human rights law provides a number of standards that are applicable in this context and provides guidance to States, both individually and at the international level, on how to tackle the negative impact of the activities of vulture funds on the full enjoyment of human rights and the right to development.

At the international level

75. The adverse impact of the activities of vulture funds on human rights cannot be effectively addressed in an isolated or partial manner. States are expected to cooperate in good faith in the process leading to the establishment of an international mechanism for sovereign debt restructuring. In this context, they should ensure that the obligation to service their debt does not lead them to derogate from their minimum core obligations with respect to economic and social rights.[85] Restructuring processes should aim at reaching an agreement that enables States to service their debts without compromising their capacity to fulfil their human rights obligations.[86]

At national level

76. States should undertake concrete steps aimed at enacting human rights-compliant national legal frameworks to regulate the activities of vulture funds that take place within their jurisdiction, particularly disruptive litigation concerning sovereign debt. National laws should expressly exclude the possibility of seizing development cooperation funds, as well

[84] See, in general, T. Karimova, *Human Rights and Development in International Law* (Routledge, 2016), pp. 31-86.

[85] Guiding principles on foreign debt and human rights (A/HRC/20/23 and Corr.1, annex), principle 18.

[86] Ibid., principle 53.

as undertaking litigation against States in debt distress. It is a good practice to limit the value of the claim to the discounted price originally paid by the creditor. In addition, States should ensure that vulture funds domiciled in their territory or operating in their jurisdiction respect human rights throughout their operations.[87] Domestic regulations should also recognize States' extraterritorial obligation to fulfil economic, social and cultural rights.[88]

77. National laws should provide the basis for regulating the behaviour of abusive non-cooperative creditors in restructuring processes by providing that they cannot enjoy better treatment than those that are acting in good faith.[89] Guarantees should be provided that the amount of debt recoverable by a vulture fund cannot exceed that recovered by other, cooperative creditors.[90]

78. Steps should be taken to regulate the trade of sovereign debt on the secondary market and to guarantee transparency. In the absence of an international restructuring mechanism, all efforts must be directed towards achieving a negotiated settlement.[91]

79. Finally, States should assess whether servicing debt to vulture funds would result in derogation from their minimum core obligations with respect to economic, social and cultural rights. Debt sustainability analysis should include an evaluation of the level of debt a country can carry without undermining its capacity to fulfil its human rights obligations and the realization of the right to development.[92]

Management of vulture funds

80. The Guiding Principles on Business and Human Rights intend to foster respect for human rights among States, business enterprises, financial institutions and other actors. They apply to commercial entities operating in the financial sector. Vulture funds thus also have a responsibility to respect human rights.[93] This specifically includes the responsibility to "avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur".[94]

81. The responsibility to respect human rights does not require a direct link of causality between the activities of vulture funds and their negative impact.[95] Vulture funds bear a duty of due diligence, which entails identifying, preventing, mitigating and accounting for human rights impacts. In addition, vulture funds should put in place policies and systems to "know and show" that they respect human rights throughout all their activities.[96] This

[87] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex), principle 3. On 26 June 2014, the Human Rights Council adopted resolution 26/9 on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

[88] See Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), principle 32.

[89] This principle encompasses the basic requirements of fairness, honesty and trustworthiness. UNCTAD, *Sovereign Debt Workouts*, p. 22. See also UNCTAD, Principles on Promoting Responsible Sovereign Lending and Borrowing (2012).

[90] Guiding principles on foreign debt and human rights, principle 61.

[91] Ibid., principle 59.

[92] Ibid., principles 8, 48 and 65.

[93] Ibid., principle 11.

[94] Ibid., principle 13 (a).

[95] Ibid., principle17. See also OHCHR, reply to the request of the Chair of the Organization for Economic Cooperation and Development Working Party on Responsible Business Conduct on the application of the Guiding Principles to the financial sector, 27 November 2013. Available from www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf.

[96] Guiding Principles on Business and Human Rights, principle 15.

includes assessing the actual or potential negative impact on the economic and social welfare and sustainable development of the countries targeted by their investment strategies.

82. Although the general framework described above is fully applicable to vulture funds, difficulties may arise in its implementation in practice. In fact, it is not expected that vulture funds will voluntarily undertake to respect the Guiding Principles and adjust their behaviour accordingly, which underscores the need for appropriate national and international regulation.

X. Conclusions and recommendations

83. **Vulture funds are inherently exploitative, since they seek to obtain disproportionate and exorbitant gains at the expense of the full realization of human rights, particularly economic, social and cultural rights, and the right to development. Seeking the repayment in full of a sovereign debt from a State that has defaulted, or is close to default, is an illegitimate outcome. In a debt crisis, more than financial obligations are at stake.**

84. **The duty to observe due diligence to prevent a negative impact on and potential violations of economic, social and cultural rights applies to all States and stakeholders, including the management of vulture funds. Therefore, assessments of the impact of their activities on the enjoyment of economic, social and cultural rights should be made systematically.**

85. **Excessive claims awarded to vulture funds have allowed them to reap profits at the expense of the welfare and sustainable development of the poorest countries, without taking due account of the negative consequences of such actions on the State's capacity to fulfil its human rights obligations.**

86. **The Advisory Committee recommends to the Human Rights Council that it:**

(a) **Maintain the issue of vulture funds and human rights on its agenda in order to assess the impact of their activities on economic, social and cultural rights and the right to development, and to support further initiatives aimed at identifying and curtailing illegitimate activities by vulture funds;**

(b) **Explore further ways of mainstreaming human rights in the context of debt restructuring workouts and operationalizing processes aimed at assessing and monitoring the negative impact of the activities of vulture funds on the full enjoyment of economic, social and cultural rights and on the realization of the Sustainable Development Goals;**

(c) **Commend the work of the African Legal Support Facility, and call upon States to support the expansion of this mechanism so as to assist developing countries in litigation with vulture funds and other similar, speculative ways of manoeuvring on financial markets;**

(d) **Adopt a new resolution, following the examination of the present report, in which it would entrust the Advisory Committee with the follow-up of the issue in order to make concrete recommendations to States and relevant stakeholders. A further study reviewing relevant national legislation and case law, as well as good practices would help States in the process of enacting further regulations.**

87. **The Advisory Committee recommends to Member States that they:**

(a) **Enact legislation aimed at curtailing the predatory activities of vulture funds within their jurisdiction. Domestic laws should not be limited to HIPCs but should cover a broader group of countries and apply to commercial creditors that refuse to negotiate any restructuring of the debt. Claims that are manifestly disproportionate to the amount initially paid to purchase the sovereign debt should not be considered. The laws in Belgium and the United Kingdom provide valuable examples for other States in drafting national laws aimed at limiting the practices of vulture funds;**

(b) **Adopt measures aimed at limiting disruptive litigation by vulture funds in their jurisdiction. National courts or judges should not give effect to foreign judgments or conduct enforcement procedures in favour of vulture funds that are pursuing a disproportionate profit. It is a good practice to limit the value of vulture funds' claims to the discounted price originally paid for the bonds;**

(c) **Enhance and promote transparency by ensuring that the owners and shareholders of vulture funds are disclosed and made subject to appropriate taxation. Transparency on sovereign debt in the secondary market should be particularly ensured. Courts and other relevant national authorities must have access to all relevant documents and information on the amounts and the identity of the creditors;**

(d) **Ensure that adjudication bodies, including the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration, integrate in their practices the duty of arbitrators to assess at a preliminary stage the bona fides of vulture fund claims as well as the standing of the claimant, by requiring the disclosure of the details of the debt;**

(e) **Ensure that the principle of bona fides is adequately reflected in national legislation and applied by domestic courts in relation to litigation concerning sovereign debt restructuring processes by providing that abusive creditors do not enjoy better treatment than those cooperative creditors that are acting in good faith.**